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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 591

VIVIAN WALSH BARRON,

Petitioner,

-versus-

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

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Comes now Vivian Walsh Barron, petitioner herein, by and through her undersigned attorney, and respectfully prays that this Honorable Court issue its Writ of Certiorari to review the decision of the District Court of Appeal, Third District of Florida on the 5th day of March, 1968, and the Order of the same Court on the 26th day of March, 1968, denying Petition for Rehearing.

OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal, Third District, was entered on March 5, 1968. It is annexed hereto as Exhibit A and is reported in 207 So.2d 696.

Order denying Petition for Rehearing was entered on March 26, 1968, it is annexed hereto as Exhibit B.

The Supreme Court of Florida denied Petition for a Writ of Certiorari on May 31, 1968. A copy is annexed hereto as Exhibit C. Petition for Rehearing was filed in the Supreme Court of Florida on June 24, 1968. A copy is annexed as Exhibit D.

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S. Code, Section 1257 (3) because a title, right, privilege, or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal, Third District, State of Florida and under Rule 19 (A) of the Rules of the Supreme Court of the United States effective October 2, 1967, because a state court has decided a Federal Constitutional question of substance in a way probably not in accordance with applicable decisions of this Court.

QUESTION PRESENTED

I

IN A CONVICTION FOR FORGERY WAS DUE PROCESS OF LAW DENIED WHEN NO PROPER

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* * *

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QUESTION PRESENTED

I

IN A CONVICTION FOR FORGERY WAS DUE PROCESS OF LAW DENIED WHEN NO PROPER

PREDICATE WAS LAID FOR THE INTRODUCTION INTO EVIDENCE OF THE "STANDARDS" USED AS THE BASIS FOR COMPARISON WITH THE DOCUMENTS ALLEGEDLY FORGED.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Constitution of the United States - Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 United States Code - Section 1257 (3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes

of, or commission held or authority exercised under, the United States.

Title 28 Revised Rules of the Supreme Court of the United States Rule 19. Considerations governing review on certiorari:

> 1(a) Where a state court has decided a federal question of substance not therefore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Florida Statutes (1967):

Chapter 92.38 - COMPARISON OF DISPUTED WRITINGS

> Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury, or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute.

* * * *

STATEMENT OF THE CASE

The State of Florida filed an Information against Vivian Walsh Barron on ten counts of forgery.

She was convicted by a jury on each count.

At the trial handwriting experts testified that the documents alleged to have been forged were,

at least in part, written by her. Since neither they nor anyone else saw her sign the questioned documents personally, standards of comparison were used. Those samples consisted of:

(a) Arrest reports allegedly made by her during the time that she was employed as a police officer.

(b) An application for employment, allegedly signed by her many years before. The testimony reflected the fact that no one had seen her sign or make out the arrest reports and that one witness thought she had seen her make out the application for employment.

The standards were not pleadings in the case, were not admitted as genuine, were not in the record for any purpose except to be used as standards for comparison purposes.

The trial court stated on at least one occasion that the jury could decide the genuineness of the standards.

After conviction, Petitioner appealed to the District Court of Appeal of Florida, Third District. That Court affirmed by the opinion which we seek to have reviewed through these proceedings.

Petition for Writ of Certiorari was filed in the Supreme Court of Florida. That Court denied the Petition.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED UPON IN THE STATE COURTS

The Federal questions presented here was raised as follows:

1. At the trial level, by objection to the introduction into evidence of the reports allegedly signed by Petitioner and to be used as the standards for comparison against the Petitioner to identify her signature; by motion for directed verdict (R-840); by motion for arrest of judgment or in the alternative a new trial (R-860).

2. On appeal, at the District Court of Appeal of Florida, Third District, by Assignments of Error Numbers 3, 5, 6 and 7 (R-872-873).

The Third District Court of Appeal of Florida affirmed the judgment of the trial court, and stated:

> "In this case the appellant was charged with having forged customer return cash vouchers with intent to injury and defraud a named department store. The sample writings submitted by the state for use as standards of comparison to prove that the disputed writings (cash return vouchers) were made by the defendant, consisted of a written application submitted to the store by the defendant in 1960 in seeking employment, and a number of arrest reports made by the

> defendant in 1964 while she was employed as a police officer. Prior to the use of those standards by witnesses for comparison with the disputed writings, evidence was duly submitted regarding their genuineness, on the basis of which the court overruled objection thereto and permitted their use as standards for comparison. On examining the record we find no reason to disturb that ruling of the trial judge. See Annot. 41 A.L.R.2d 575"

The point was again raised in the Supreme Court of Florida, where certiorari was denied on May 31, 1968. Petition for rehearing was denied on June 24, 1968.

REASONS FOR GRANTING THE WRIT

This Honorable Court has consistently held that it is a violation of Constitutional "...due process to convict and punish a man without evidence of his guilt." Thompson v. Louisville, 362 U.S. 199 (1960). More recently, that the burden "...is on the State to prove that an accused has committed an act bringing him within a criminal statute." Johnson v. Florida,_____ U.S._____, 20 L.Ed.2d 838 (1968).

It is the Petitioner's contention that the record in the present case is totally devoid of any evidence upon which the trial court or the appellate court could legally predicate a ruling that the handwriting exemplars introduced into evidence were genuine within the meaning of Section 92.38, Florida Statutes. That Section provides:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute."

The pivotal clause in the cited statute is that an exemplar, to be admissible against a defendant, must be "...proved to the satisfaction of the judge to be genuine..." The two exemplars used by the State in the case at bar were (1) arrest reports allegedly made by her while she was employed as a police officer; and, (2) an application for employment allegedly signed by the Petitioner many years before. No one had seen the defendant sign or fill out the arrest reports. One witness thought she had seen the Petitioner complete the application for employment.

In Chemical Corn Exchange Bank and Trust Company v. Frankel, 111 So.2d 99 (Fla.App. 1959), the Third District Court of Appeal, Florida, examined the ways in which a handwriting sample may be admitted into evidence:

> "Our statute has been interpreted to mean that if the specimen signature sought to be used as a basis for comparison with the disputed signature is proved to the satisfaction of the judge to be genuine, it is admissible in evidence as a proper standard upon which testimony of its

> comparison with the disputed signature may be predicated. The genuiness of the standard to be used may be established in any of several ways. If its genuineness is admitted by the parties, this may be accepted by the trial judge, and further proof thereof rendered unnecessary. If, however, the genuineness of the standard is not admitted, it may be used as a basis for comparison if it is in evidence before the court in the case for some other purpose, or forms a part of the pleadings in the case." (111 So.2d 99 at page 101).

In the present case, the genuineness of the exemplars was not admitted by the defendant. The exemplars were not in evidence for some other purpose, nor did they form a part of the pleadings in the present case. To the contrary, the sole purpose of introducing the exemplars was to attempt to identify the Petitioner's handwriting.

In the case at bar, the factual issue of the genuineness of the exemplars was determined by the trial judge. The Petitioner respectfully submits that there was no evidence before the trial judge upon which he could rule that the exemplars represented the handwriting of the Petitioner. The arrest reports and employment application admitted as examples of Petitioner's handwriting were not connected to Petitioner by any evidence.

The Federal Statute at 28 U.S.C. § 1731 (1948), is similar to Florida Statute, Section 92.38, supra. That

statute provides:

> "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributal to such person." 28 U.S.C. § 1731 (1948).

A reading of the decisions interpreting the above statute discloses that where convictions were upheld, there was competent evidence in the record to substantiate the genuiness of the exemplars. e.g. Straus v. United States, 311 F.2d 926 (5th Cir. 1963).

The gravity of the denial of due process in this case becomes even more pointed when it is realized that the ruling of the trial judge serves as the entire predicate for the testimony of the handwriting expert. Moreover, the issue of handwriting identity was the only question for the jury to resolve.

Accordingly, on this record, the only factual issue submitted for the jury's determination, was predicated upon a totally erroneous ruling by the trial judge. Given this erroneous ruling, a once very weak case becomes a case which appears on its face to be conclusive. The violations of due process in Johnson v. Florida, supra, are repeated in the case sub judice. It is "...a violation of due

process to convict and punish a man without evidence of his guilt." Thompson v. Lousiville, supra. Ergo, in this case, where the entire conviction is based upon unsubstantiated handwriting exemplars, which are the only evidence of guilt. the Petitioner stands convicted in violation of due process of law.

No direct, clear evidence exists that proved she signed the exemplars. This opinion evidence is based on circumstantial evidence.

CONCLUSION

For the reasons stated, the granting of the Writ is urged. The decision of the Court below should be reversed because it affirmed a judgment devoid of evidence against the Petitioner on the only issued tried, in violation of her right to due process.

Respectfully submitted.

_____

***

EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1968

VIVIAN WALSH BARRON, Appellant, ** vs. ** CASE NO. 66-936 THE STATE OF FLORIDA, Appellee. **

Opinion filed March 5, 1968.

An Appeal from the Criminal Court of Record for Dade County, Jack A. Falk, Judge.

Norman Francis Haft, for appellant.

Earl Faircloth, Attorney General and Jesse J. McCrary, Jr., Assistant Attorney General, for appellee.

Before CHARLES CARROLL, C.J., and PEARSON and HENDRY, JJ.

CHARLES CARROLL, Chief Judge.

The appellant was convicted on ten counts on an information charging forgery, for which concurrent sentences were imposed. He seeks reversal on three grounds.

Appellant's first contention is that the court committed error by permitting use of samples of her handwriting for comparison with the disputed handwritings, on the basis of evidence presented as to the genuineness of the samples, because their genuineness had not been admitted by the defendant and because the samples were not a part of the pleadings and were not in evidence for some other purpose. In support thereof the appellant relies on Brantley v. State, 84 Fla. 649, 94 So. 678; Thompson v. Freeman, 111 Fla. 433, 149 So. 740; and Chemical Corn Exchange Bank & Trust Co. v. Frankel, Fla.App. 1959, 111 So.2d 99, 72 A.L.R.2d 1270.

In modification of the common law rule against such comparison of writings or signatures, the legislature enacted an enabling statute (Laws of Florida 1861, Ch.1096, § 55, which as carried forward now appears as § 92.38 Fla. Stat., F.S.A.), reading as follows:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of

witnesses respecting the same, may be submitted to the jury, or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute."

In order to give effect to the statute, and at the same time give due recognition and effect to those prior decisions, we consider the rule relating to comparison of a disputed writing with a writing offered as a standard for comparison, to be that the statutory requirement that genuineness of a sample offered for comparison must be "proved to the satisfaction of the judge" can be met by evidentiary proof presented to the judge, or by admission of its genuineness by the parties in the pleadings or before the court, or when it is in evidence before the court in the case for some other purpose.

Accordingly, we reject as unsound the appellant's contention that the genuineness of a sample writing intended for use as a standard for comparison with a disputed writing involved in the case can not be established by evidence presented to the judge. To so hold would be contrary to the statute and would detract materially from its usefulness.

In this case the appellant was charged with having forged customer return cash vouchers with intent to injure and defraud a named department store. The sample writings submitted by the state for use as standards of comparison to prove that the disputed writings (cash return vouchers) were made by the defendant, consisted of a written application submitted to the store by the defendant in 1960 in seeking employment, and a number of arrest reports made by the defendant in 1964 while she was employed as a police officer. Prior to the use of those standards by witnesses for comparison with the disputed writings, evidence was duly submitted regarding their genuineness, on the basis of which the court overruled objection thereto and permitted their use as standards for comparison. On examining the record we find no reason to disturb that ruling of the trial judge. See Annot. 41 A.L.R.2d 575.

We have considered the remaining contentions of the appellant in the light of the record and briefs and find them to be without merit.

No reversible error having been made to appear, the judgment appealed from is affirmed.

Affirmed.

EXHIBIT B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1968

TUESDAY, MARCH 26, 1968

VIVIAN WALSH BARRON, **

Appellant, **

vs. ** CASE NO. 66-936

THE STATE OF FLORIDA, **

Appellee. **

**

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

s/ William P. Carter
Clerk District Court of
Appeal, Third District

cc. Norman Francis Haft
Jesse J. McCrary, Jr.
J. F. McCracken

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

* * *

EXHIBIT C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

FRIDAY, MAY 31, 1968

VIVIAN WALSH BARRON,	**	
Petitioner,	**	
vs.	**	CASE NO. 37,284
THE STATE OF FLORIDA,	**	DISTRICT COURT OF APPEAL, THIRD DISTRICT
Respondent.	**	
	**	
	**	

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional

briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

s/ Sid J. White
Sid J. White
Clerk Supreme Court.

cc. Hon. W. P. Carter
Hon. J. F. McCracken
Hon. Milton E. Grusmark
Hon. Jesse J. McCrary, Jr.

* * *

EXHIBIT D

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1968

MONDAY, JUNE 24, A.D. 1968

VIVIAN WALSH BARRON, **

Petitioner **

vs. ** CASE NO. 37,284

STATE OF FLORIDA, **

Respondent **

On Consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A true copy,

TEST:

s/ Sid J. White
SID J. WHITE
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF MAY 31, 1968 IN THE ABOVE CAUSE)